2. Refers the cases back to the Commission;

3. Orders that the costs of these applications and those of Cases 98 and 99/63, including the costs of the applications for the adoption of an interim measure, be borne by the Commission.

Hammes Rossi Lecourt

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

Ch. L. Hammes
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 MAY 1964[1]

Mr President,
Members of the Court,

The problems raised in the two cases which concern us today (joined by an order of 23 April 1964 for the purposes of the oral procedure and therefore also for the opinion) relate to the classification of servants following their integration under the new Staff Regulations; these problems were considered in detail by my colleague Advocate-General Lagrange and the Court in *Maudet v Commission of the European Economic Community*.

The facts appear on the whole to be indisputable.

The first applicant (Case 79/63) and the second applicant (Case 82/63) commenced employment with the Commission of the EEC on the basis of 'Brussels contracts' (contracts dated 18 March 1959 in the case of the second applicant). They were assigned to the Statistical Office and at first received salaries corresponding to Grade A 6/1 (in the case of the first applicant) and Grade A 5/2 (in the case of the second) under the scale of salaries in the ECSC Staff Regulations. After a number of salary increases (by letter of the Commission of 14 December 1960 the first applicant was promoted to Grade A 5/2, and the second applicant was promoted to Grade A 4/1 by a letter from the Commission of the same date), the two applicants were appointed, during 1961, Heads of Division in the Statistical Office, in the case of the first applicant by Decision of 22 December 1961 classifying him in Grade A 4/2 as from 1 December 1961; and in the case of the second, by Decision of 3 May 1961, with classification unchanged.

In the integration procedure, which was introduced after the entry into force of the new Staff Regulations for Community officials in order to canvass the possibilities of confirming the appointments of individual employees, the duties of the applicants were described in the integration reports as those of

1 — Translated from the German.

Heads of Division. In both cases, the integration procedure resulted in their being established and classified in Grade A 4/2 (Decisions of the Commission of 21 January 1963).

Both officials appealed to the Commission in writing against this classification in accordance with Article 90 of the Staff Regulations (the first applicant on 2 April 1963, the second applicant on 4 April 1963). They asked to be classified in Grade A 3 with effect from 1 January 1962, relying on the fact that before and after the entry into force of the Staff Regulations, as also the issuing of the decisions as to integration, they had as Heads of Division performed duties for which Annex I to the Staff Regulations required a classification in Grade 3.

In both cases the reply came from the President of the Commission in a letter of 21 May 1963 that the Commission did not at present consider itself able to reply to the requests, since questions connected with Article 102 of the Staff Regulations, and the comparative synopsis of basic posts and corresponding career brackets in Annex I to the Regulations, had still be be examined in full.

It was then that the applications were made, containing the following conclusions:

— annulment of the establishment of the applicants as officials in so far as the applicants were classified in Grade A 4;

— annulment of the Decision of the Commission contained in the letters of 21 May 1963 rejecting the requests for reclassification;

— a ruling that the Commission must classify the applicants in Grade A 3;

and as a subsidiary request

an order that the European Economic Community or, alternatively, the Commission of the European Economic Community should pay damages of 1 Belgian franc, the applicants reserving the right to increase this claim during the course of the action.

These, essentially, are the conclusions which I have to consider today.

There is also the question of the judgment on costs which the Court has still to give in Cases 98 and 99/63, and Cases 98 and 99/63 R. The applications in Cases 98 and 99/63 were brought by the same officials, when the Commission issued a vacancy notice during the course of the written procedure in Cases 79 and 82/63 for a Grade A 3 post in the Statistical Office of the European Communities (published in the Staff Information Bulletin of 25 October 1963). The applicants were prompted to bring these actions by the Commission's argument, in Cases 79 and 82/63, that it was unable to meet the applicants' demands to be classified in A 3 because the detailed list of posts showed that no post in this grade was vacant. After the Commission stated in the proceedings for suspension of the operation of the contested vacancy notice, instituted at the same time as the proceedings in Cases 98 and 99/63, that it would give effect to the judgment of the Court of Justice in each case and, if the applications in Cases 79 and 82/63 were successful, would classify the applicants in Grade A 3 with effect from 1 January 1962, the applications for annulment in Cases 98 and 99/63 were withdrawn. A decision is required as to costs in those proceedings and in the proceedings for suspension, when judgment is given in Cases 79 and 82/63 (cf. order of the President of 13 November 1963) in accordance with the orders made by the Chamber on 12 March 1964, which must be regarded as binding in this respect.

Legal Consideration

I — Conclusions in Cases 79 and 82/63

1. *Who is the defendant in the application?*

Notwithstanding the previous judg-

ments given in *De Bruyn* (Case 25/60), *Schmitz-Wollast* (Case 18/63) and *Raponi* (Case 27/63), which followed the opinions of the Advocates-General and, moreover, the long-established practice of the Court on this point, the applicants in the present proceedings took the view that it was necessary to re-examine whether the EEC as such or only the EEC Commission should be named as defendant in legal proceedings. They are of the opinion that there is special justification for so doing since their intention is to make the Council of Ministers a party to the proceedings, thus enabling them to have recourse to the first paragraph of Article 21 of the Protocol on the Statute of the Court of Justice of the EEC, which provides that the Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. This is due particularly to the Commission's claim that it is unable to regularize the position of the applicants owing to the refusal of the Council to provide for more posts in career bracket A 3 in the Commission's budget.

The impression in fact given by the present proceedings, with the problems they raise concerning the rules governing budget provisions, which are the province of the Council of Ministers, is that it might be useful to have the Council of Ministers made party to the proceedings (One might even give a thought here to the necessity in cases such as these for some means of joining parties compulsorily, which has hitherto been foreign to the procedural law of the Court of Justice.)

We must ask ourselves, however, whether the desired objective — that the Council of Ministers should present its observations on the problem before us — can be obtained by the means chosen by the applicants, and by that means alone.

After further careful consideration, I do not think this is the case.

First, it should be borne in mind that it is possible to obtain information from the Council of Ministers in the course of proceedings — which is, after all, the main concern of the applicants — even though the Council of Ministers is not a party to them (cf. the second paragraph of Article 21 of the Protocol on the Statute of the Court of Justice of the EEC).

Secondly, as I have already pointed out in the *Raponi* case, I think that Article 21 of the EEC Statute of the Court of Justice in fact provides significant support for the theory that in legal proceedings against the Community, the latter and *all* its institutions cannot be parties at the same time. How otherwise is one to interpret the phrase in Article 21, 'institutions *not* being parties . . .'? If the applicants' view is correct, the phrase would be meaningless, as would be the right of voluntary intervention in proceedings (Article 37 of the Statute of the Court of Justice of the EEC) given to other Community institutions. One would also be faced with the question which institution, according to this view, would be responsible for bringing proceedings — a question which seems all the more justified in the case of common institutions and where an institution fails to appear.

We must therefore consider that only specific individual institutions can be parties to the proceedings, just as the Treaty, Article 4, (substantive law) and the Staff Regulations, Article 2, (Staff law) confer responsibility for the exercise of particular powers on individual institutions.

In disputes concerning applications for annulment directed against particular measures by an individual institution, it is only the institution called upon to act, to the exclusion of all others, which can be the defendant, assuming always that the division of powers is respected. As far as the present applications for annulment are concerned, they relate solely to measures taken by the Com-

mission (establishment of officials; rejection of requests for a different classification). Consequently there can be no question at all here of applying Article 18 of the Statute of the Court of Justice of the EEC (the meaning of which is still not clear), which provides that copies of the documents in the case shall be communicated *not only to the parties to the proceedings* but to the institutions whose decisions are in dispute.

On those grounds, and the other grounds covered in the *Raponi* case, I do not think it is possible in these applications for annulment to recognize any institution other than the EEC Commission as party to the proceedings, or to bring in the Council by any means other than by means of the second paragraph of Article 21 of the EEC Statute.

As for the claims for damages based on the alleged wrongful act or omission on the part of the Commission, the question can remain open for the present, since the applications are made only in the event of the applicants' principal conclusions being dismissed. In fact I am inclined on this point, also, to the view that an action cannot lie against the Community as such. Rather, an applicant should be obliged even in these cases to indicate in the application the institution alleged to have caused the damage, and bring his action expressly against that institution.

2. Application for the annulment of the Decisions of 21 January 1963

As to the substance of the case, the applicants first seek the annulment of the Decisions establishing them as officials in so far as these, contrary to Article 102 of the Staff Regulations, did not establish them in the career bracket to which the applicants were by implication entitled by virtue of the particular duties to which they were assigned.

I believe that all the necessary points regarding this were made in the *Maudet* judgment. The Court of Justice has clearly emphasized that Article 102 of the Staff Regulations was chiefly directed at preserving legal positions as they stood at the date of entry into force of the Staff Regulations, by a simple transposition of the classification hitherto accorded into the table in Article 66 of the new Staff Regulations. According to the judgment just mentioned, all that is required is to ascertain which grade and step a servant occupied prior to the entry into force of the Staff Regulations, since during the first phase of integration the duties performed, as set out in Annex I to the Staff Regulations, are not as yet decisive.

On the other hand, the attempt by the applicants to give a different meaning to the phrase 'grade and step impliedly accorded' cannot succeed. The applicants consider that in applying Article 102 of the Staff Regulations it is not the date of the entry into force of the Regulations which is decisive but the date on which a servant becomes subject to the Regulations. On that date a servant may by implication have been given a different classification from the one he had under a 'Brussels contract' prior to the entry into force of the Regulations, by virtue of the fact that he has been assigned to duties which correspond to a particular grade under Annex I to the Staff Regulations. However, I do not think that argument is sound. The text of Article 102 admits of no doubt as to the fact that the only relevant consideration is the legal position accorded to a servant '*before* these Staff Regulations *were applied to him*'. Just what was impliedly accorded then cannot be decided upon in the light of the legal provisions of the new Regulations, whose applicability or otherwise to particular servants can only be confirmed in the integration procedure.

It is not difficult to say to which classification the applicants belonged before their integration, because it is known

precisely what their Brussels contracts, after various amendments taking into account the staff regulations of the ECSC, comprised. Accordingly they have no claim under Article 102 of the Staff Regulations to be classified in Grade A 3. Their first conclusions should be dismissed for lack of grounds as in the *Maudet* case.

3. As for the second head of the conclusions — the annulment of the refusal by the Commission to place the applicants in grades corresponding to their duties, as prescribed by Annex I to the Staff Regulations — it should be said that during the course of the oral procedure the Commission abandoned its original objections as to admissibility and that here there is no need for the Court to examine them of its own motion.

As to the question whether this head of the conclusions is well-founded, we may refer in the first place to the *Maudet* judgment, as in the case of the first head, since the facts in that judgment correspond in many respects to those in the present proceedings. On that occasion the Court declared that a servant who, after integration, is left in a position, which, because of the duties attached to it, corresponds to a higher classification under the new Staff Regulations than that which results from Article 102 thereof is entitled to have his position regularized so as to comply with Annex I to the Staff Regulations.

Maudet's right to be classified in Grade A 3 with effect from 1 January 1962 was recognized when the Court declared that he was fulfilling the duties of a Head of Division prior to the entry into force of the new Regulations and was accordingly within career bracket A 4, that is to say, a bracket which according to the careers table of the ECSC marked the start of the career of an 'administrateur principal' (principal administrator). The Court also declared that for this career bracket the only classification to be considered under the new Staff Regulations was one in Grade A 3, as provided by Annex I, for Heads of Division. Since even after his integration as an official, the applicant Maudet continued to perform his original duties which, moreover, according to the Commission's description of posts in the service, corresponded to a Grade A 3 classification, there could be no question of leaving his current classification unaltered.

The same applies in the present case. Both before and after the entry into force of the Regulations, before and after their integration, the applicants performed the duties of Heads of Division. The Commission recognized this in its reports on establishment, as also in the service reports made under Article 43 of the Staff Regulations; it may be mentioned at this point that the duties actually performed correspond to those of Heads of Division as indicated in the description of posts in the service drawn up by the Commission itself. Finally, it is a fact that the Commission has made no attempt to alter the organization of its administration, but instead attempted to obtain from the Council of Ministers the necessary budgetary credits for reclassifying the applicants' posts.

There now remains only the question whether the present case should be decided differently in view of the Commission's emphatic written and oral assertions that despite its representations to the Council of Ministers it has no vacant posts in Grade A 3, and thus is prevented by reason of the budgetary regulations from acceding to the requests of the applicants, while admitting that they are well-founded.

It must be noted, however, that this same argument was advanced in the *Maudet* case, as is evident from the grounds of the judgment. There, too, the Commission claimed that it had no Grade A 3 post vacant, but that the Council had refused its requests for budgetary provision to be made in this

respect. If the Court nevertheless gave judgment for Maudet, this can only mean that it did not consider that the Commissions' argument had any decisive importance.

How is one to interpret this? There are two possibilities. Either in the Court's view it is sufficient that the Commission has vacant A 3 posts available in its detailed lists of posts, even though these are reserved by it for other Directorates General, so that there are no budgetary obstacles to prevent the applicants from being granted what they seek, because the Commission is free to make alterations within its detailed list of posts; or else it must be said that the Court considers the attitude *in fact* adopted by the Council in budgetary matters to be irrelevant, since the dispute involves the *legal rights* of servants arising directly from the Staff Regulations, adopted by the Council itself, which the Council is compelled by law to do all that is necessary and in its power to put into effect. According to this view the Council cannot — at least with regard to past actions — prevent, by refusing to provide the necessary budgetary means, the implementing of measures which it has itself provided in the Staff Regulations and in the Annexes to the Staff Regulations concerning the integration of servants.

There seem to be no irrefutable arguments against either of these interpretations. But it must be recognized that no other solution lends itself to a decision in the present case. The fact that the applicants in the present proceedings belong to the Joint Statistical Office of the Communities, whilst the Commission admits that there are vacant posts in Grade A 3 outside the statistical service, seems unimportant to me, since I cannot see how the posts reserved to the Commission in the Statistical Office, which is not autonomous, can be granted special consideration under the budget. The same considerations apply as in the *Maudet* case therefore, as regards the possibility of having to use other vacant posts within the Commission's detailed list of posts.

This means that the Court must find in these proceedings, too, that the applicants have established their claim to be classified in Grade A 3 with effect from 1 January 1962, without any need for a statement by the Council on the budgetary questions which have arisen, since this would be relevant only to the *method* of giving effect to, not to the *existence* of, the rights claimed.

The second and third heads of the conclusions — the former requesting annulment of the Commission's refusal to classify the applicants in the grades to which they claim to be entitled and the latter aimed at having this legal claim acknowledged — are accordingly well-founded.

4. The subsidiary claims for damages require no further consideration. They would only require consideration if the applicants were unable to succeed in their principal conclusions.

II — Decision as to costs in cases 98 and 99/63

However, a word must be said as to the question of costs, still unsettled, in Cases 98 and 99/63 as well as to the application for suspension of the operation of a measure made at the same time, which was left over in view of the close relationship, as to persons and subject-matter, to the decision in the present proceedings.

You will remember that the applicants expressed the view that the Commission should bear the costs of the proceedings in full, whilst the latter asked that each party be ordered to pay its own costs. The relevant provision governing settlement in the case of appeals which are withdrawn is Article 69 (4) of the Rules of Procedure which states that: 'A party who discontinues or withdraws from proceedings shall be ordered to

pay the costs, unless the discontinuance or withdrawal is justified by the conduct of the opposite party'. This means that two questions are to be considered:

— when does the conduct of the other party justify withdrawal?

— if it does, is each party to bear its own costs or can one party be made to bear the total costs of the action?

The answer to the second of these questions presents no difficulty. The rule that the parties shall bear their own costs, which results from the second subparagraph of Article 69 (4), only applies if the opposite party has not asked for costs. To settle the costs in this way would be particularly pointless in staff cases, since in such cases — leaving aside the provisions of the second subparagraph of Article 69 (3) (cf. Article 70) — institutions which are parties to the proceedings must, in principle, bear their own costs. If Article 69 (4) is to acquire significance as regards withdrawals of applications by staff, then it must allow the opposite party to be made to bear the larger part of the costs, that is to say, that proportion which was caused by its conduct; and this may even, according to the circumstances, amount to the whole of the costs of the action.

As for the answer to the first question, the practice followed by national courts in their procedure may provide some assistance. The rule there is that a plaintiff or applicant who discontinues or withdraws his complaint bears the cost of the action[1] Rosenberg (Lehrbuch des Deutschen Zivilprozeßrechts, 9th ed., p. 621) goes so far as to say that this is a general legal principle. The commentators on the Deutsche Verwaltungsgerichtsordnung[2] stress that there is no place here for the exercise of discretion; the grounds for discontinuance or withdrawal cannot be reviewed and as a rule no importance is attached to any misconduct by the parties. Only under very limited circumstances can this principle be departed from, for instance if an authority has given wrong information concerning appeals, thus prompting the institution of proceedings (Koehler, supra), or if the action was commenced because of misleading statements by the administration (Conseil d'État 1955, p. 778) or if the explanation of the discontinuance or withdrawal can be found in the fact that the plaintiff has obtained a measure of satisfaction from the defendant (Conseil d'État 1913, p. 601).

A similar approach can be traced in the cases. According to these, Article 69 (4) applies only in exceptional circumstances where the responsibility for the incurring of the costs of litigation lies heavily on the opposite party, for instance if the bringing of an action, in itself not admissible, is caused by the conduct of the opposite party, which later — for example by an unequivocal statement as to the legal nature of the contested measure — makes it possible to correct the original error.

The facts of the present case relevant to this point were outlined by me at the start. To date, the relevant events are as follows: claim by the Commission that it had no vacant posts to meet the applicants' demands, in the statement of defence in Cases 79 and 82/63 of 28 September 1963; publication of vacancy notice for a Grade A 3 post in the statistical service on 25 October 1963; appeal against the vacancy notice (Cases 98 and 99/63) on 29 October 1963; written withdrawal of the appeal on 23 December 1963 following oral statements by the Commission in the proceedings for suspension (heard on 11 November 1963), to the effect that it would classify the applicants in Grade

1 — Gabolde, Traité pratique de la procédure administrative contentieuse, 1960, no 510; §155 of the Deutsche Verwaltungsgerichtsordnung (Law establishing the rules of procedure in contentious proceedings before the German Administrative Court), 21 January 1960.

2 — Koehler 1960, note IV to §155.

A 3 with effect from 1 January 1962 if they were successful in Cases 79 and 82/63. This sequence of events shows us that the applications in Cases 98 and 99/63 would not have been made if the Commission had at an earlier date given the above-mentioned assurance that it would meet the demands made in the applications, for it was this assurance that led the President of the Court to declare in the proceedings for suspension that the applicants had not proved that they had an interest in suspending the operation of the notice such as required the protection of the Court.

Thus we can ascertain that the Commission was responsible for the outcome in Cases 98 and 99/63, a fact which can be taken into account in making the decision as to costs. In my opinion it is reasonable and in accordance with the meaning of Article 69 (4) to order the Commission to bear the costs incurred by the applicants in Cases 98 and 99/63, that is to say, since the applicants' prospects of success are not relevant to the decision as to costs — the whole of the costs of the action.

The same considerations apply with regard to the costs of the proceedings for suspension. However, since here a judicial decision of the Court was involved, given in fact against the applicants, Article 69 (3), and not Article 69 (4), is the relevant provision.

III—Summary and Conclusion

Finally, to sum up: the first of the applicants' conclusions, for the annulment of the decision integrating them, is unfounded and should be dismissed. Their remaining principal conclusions are, however, well-founded. The Court of Justice must accordingly annul the Decision by the Commission refusing to classify the applicants in Grade A 3 with effect from 1 January 1962. This satisfies at the same time the applicants' request for a declaration from the Court.

The costs of the action are to be borne by the Commission, as in the case of *Maudet*, since the applicants were successful in the essentials of their conclusions. According to Article 69 (3) and (4) of the Rules of the proceedings in Cases 98 and 99/63, and in Cases 98 and 99/63 R.

ORDER OF THE PRESIDENT OF THE COURT 13 NOVEMBER 1963[1]

In Joined Cases 98/63 R and 99/63 R[2]

PIERO ERBA, official of the Commission of the European Economic Community,

1—Language of the Case: French.

2—The applications in Cases 98/63 and 99/63, brought by the same applicants as in Cases 79/63 and 82/63, were for the annulment of the Decision of the Commission of the European Economic Communities to publish vacancy notice no 1064. The first-mentioned cases were removed from the register of the Court by an Order of 12 March 1964.